



TOWN OF NEW LONDON, NEW HAMPSHIRE

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ZONING BOARD OF ADJUSTMENT (ZBA) MEETING MINUTES Tuesday, May 2, 2022 Whipple Town Hall, 6:30pm

MEMBERS PRESENT: Michael Todd (voting), Ann Bedard (voting), Katharine Fischer (voting), Heidi Lauridsen (voting), Frank Anzalone (voting), Lauren Snow Chadwick, Steve Root, Conrad Bolton, Peter Theroux.

MEMBERS ABSENT:

OTHERS PRESENT: Adam Ricker, Zoning Administrator, Anthony Dolan, Tom Hildreth, Pam Perkins, Marilyn Kidder

1. **Call to Order**– Michael Todd called the meeting to order at 6:30pm and called the roll.

2. **Public Hearing(s):** Application for an Appeal of Administrative Decision
Case # ZBA 23-02

Owner James Chowanski
Applicant Dolan Real Estate
Address 207 Main Street
Parcel ID 073-082-0-0-0
Zone(s) Commercial
Summary:

• #ZBA 23-02 – Dolan Real Estate is appealing the Zoning Administrator’s decision that the six electronic monitors mounted in their office window are signs that do not meet the sign regulations of the Zoning Ordinance, Article II General Provisions, Section 10.

Chair Todd stated tonight’s meeting is to hear an appeal of an administrative decision. Zoning Administrator Adam Ricker stated he observed the signs at the Dolan Real Estate office after leaving town after a night meeting. The blue glow of the lights projected onto Main Street and drew his attention to the six monitors in the windows of Dolan Real Estate. Also a few Planning Board members brought this to his attention. After reviewing the zoning ordinance, his determination was that the monitors constitute a sign according to Article II, section 10, sign regulations, b, sign definition. The monitors do not meet Article II, section 10 sign regulations, e, signs not requiring a permit, iv, as even though they are interior window signs, they are not temporary in nature and contain the name and logo of the business. Additionally, they are internally lit as prohibited by article II section 10 sign regulations, f. prohibited signs, vii.

Mr. Ricker stated following his review of the zoning ordinance on March 2, 2023 he sent an informal email to the tenants, Dolan Real Estate, to let them know the signs did not have a permit and did not comply with the zoning ordinance. As a general rule, the start of enforcement action is done via email or phone call if possible. For enforcement actions that are resolved by phone, there is not a governmental record of the action. Following the email to the tenants, he sent the property owner an official letter regarding the signs on March 6, 2023. As the applicant brought

up, Mr. Ricker stated there is a similar sign located at the Verizon store, which he was previously unaware of. He has since been in touch with Verizon's property owner and has also met onsite with the property manager to review sign compliance of all tenants, including Ace Hardware and they are actively working to achieve compliance site wide. In the case of Dunkin Donuts, Mr. Ricker does not agree that the interior menu boards are a sign, just as he does not feel that the electronic sign on the back wall of Dolan Real Estate is a sign.

Chair Todd shared 3 black and white images of the signs. He asked Mr. Ricker if they represented an accurate representation of what he saw when he first noticed the signs. He stated yes, with the exception of interior pictures as he only viewed them from the outside at that time. Mr. Ricker stated they have electronic screens and are somehow internally illuminated. Mr. Ricker does not believe it's possible to view the side that projects outside, from the inside, however they are dual faced so there is a duplicate or another panel on the other side. What faces the outside, may or may not be what faces the inside. They are held in place by a suspension system that hangs from the ceiling and each monitor hangs successively from the one above it. Mr. Ricker does think they've been turned off more recently in the evenings as he hasn't seen them illuminated when he's passed by them after attending evening meetings.

Tom Hildreth, an Attorney with McLane Middleton attended the meeting and is representing Dolan Real Estate. Anthony Dolan was also in attendance and is one of the principals of the firm. Mr. Hildreth distributed a handout that includes an extract of the zoning ordinance that addresses the sign section and photos to show the location of the Dolan Real Estate office. It is 84 feet from the edge of the sidewalk to the front plane of the building. Mr. Hildreth clarified the term that Mr. Ricker used referring to these as monitors, as if they were like a computer screen or television screen. They are not. They are pieces of paper that are generated by Mr. Dolan as they have new inventory coming in. One side is a plastic type paper and the other is traditional paper that slides into the frame and there is no internal lighting. There is lighting in the frames themselves. The electricity that causes the illumination to work also serves as the suspension of those frames from the top of the window frame.

Mr. Hildreth asked that the board find and determine that there are portions of the sign ordinance that are vague and ambiguous. As a result, this is unconstitutional as applied to this applicant. His best evidence of the vagueness of this statute is the large number of businesses that have been violating it for a long time. Chair Todd responded that he takes exception to that because whether or not they are violating it has not been determined. They are being investigated and attempting to determine if they are in compliance.

Mr. Hildreth addressed other examples of interior display that they provided to the code enforcement officer in response to the initial notice. These include Dunkin Donuts, Verizon, Ace hardware, Unleashed, Flash Photo and Hannaford. These have existed for some time without any enforcement action taken until now as a response to having them brought to Mr. Ricker's attention. Chair Todd responded if no enforcement actions have been taken against those other signs, we cannot determine whether their condition is acceptable or not. Mr. Hildreth stated he is not sure why that is.

Mr. Hildreth stated that in a previous conversation he had with Mr. Ricker, Mr. Ricker stated that in his view the issue is whether an item that is inside a building is intended to be seen from the outside. Mr. Hildreth pointed out to Mr. Ricker at that time that the provision doesn't exist in the ordinance. There is nothing that defines what a window display is and that they regulate signs that are interior to a property. Almost the entire sign ordinance is directed at traditional signs that are the ones that a put on a free-standing pole or on a building to let people know what is there.

The signs being discussed don't serve that purpose as they are so small and far away. One has to come onto private property to see what they are.

Mr. Hildreth also shared that it wasn't just Mr. Ricker driving by that brought attention to this issue. There are local realtors in town that are competitors of the Dolans who wrote to Mr. Ricker and asked for enforcement action to be taken. Mr. Ricker shared these emails and in the course of the dialogue among these local realtors, they also expressed their own doubt about how the ordinance works. The very parties that were complaining about the Dolan's sign also have doubts about how this provision works.

Mr. Hildreth stated that zoning boards clearly have the power to judge the constitutionality of their zoning ordinance and he referenced a case called *McKenzie vs. Town of Eaton* in 2007, but the case that has the best language regarding a vague local ordinance was in 2019 opinion of the Supreme Court on a case called *Working Stiff Partners vs. city of Portsmouth*. This involved short-term rentals and whether they were permissible under the then existing Portsmouth zoning ordinance. He read the relevant sections on the vagueness doctrine. There are two ways a statute can be considered vague. The first is that it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. This is where Mr. Hildreth believes the long list of other commercial enterprises that have similar kinds of displays inside their buildings without permits is evidence of the fact that vague and ambiguous since all these other people didn't know what they were doing was potentially violating the local ordinance. The second way a statute can be vague is if it authorizes or encourages arbitrary and discriminatory enforcement. He drew attention to the ordinance, specifically section c., v. as it has no definition of temporary so there is no way to know how long you can leave a sign up. It doesn't reference interior signs, only outside. The last sentences of this section state "The use of any temporary signs is intended to be displayed for a short-term and defined time period." Mr. Hildreth argued if there is a listing that is active for 60 or 90 days, every one of these is a temporary transaction. Once it is sold, the listing is rotated out and another one is put up. Every listing is a temporary engagement. Mr. Hildreth commented that this last sentence is a crazy standard. "If the town receives written complaints regarding the prevalence of temporary signs on any site, the Board of Selectmen may require any future temporary signs be presented for their approval". To leave the application of an ordinance or its interpretation to whether people complain? There are three competing real estate agents that complained to the code enforcement officer because they didn't like the competition coming into town. Is that a basis to take action? The complaints become a baseline for municipal enforcement action and it is an absurd standard that leads to arbitrary and discriminatory enforcement and that is exactly what is going on here. All the other examples of comparable, functionally equivalent product displays have been permitted to exist, unmolested, inside their buildings.

Mr. Hildreth referred back to the interior menu board in Dunkin Donuts that is visible and internally lit and stated it doesn't make sense to say that isn't a sign but the Dolan's are considered signs. That's exactly why this is arbitrary and discriminatory. As it stands, it is their position that it is unconstitutionally vague as it doesn't allow people with reasonable intelligence to know what is or isn't allowed and the way it is structured leads to arbitrary and discriminatory enforcement.

Mr. Ricker responded that he takes exception to the timeline and wants to clarify. The date of the email to the Dolan's was March 2, 2023 and subsequent to having sent that email he wanted to see if other real estate offices had these signs because he wanted to be fair and if they did too, he wanted to follow up with them. In doing so, he noticed there was an "agent on duty" sign at Sotheby's. In an email dated March 6, 2023, the author of the email stated she received a call

from him that day about her sign. She did not reach out to him about these signs. Mr. Hildreth stated this isn't important to his case but Mr. Ricker responded it is important to his credibility. Mr. Hildreth stated this just makes his point even more profoundly since this agency had a sign in its window that was determined to be non-compliant but they put it up thinking it was allowed. Mr. Ricker responded it was not a sign in the window, it was a temporary sandwich board type sign outside that he had never seen previously. Mr. Hildreth stated the ordinance is not firm on a number of fronts and should not be enforced against the Dolan's in this case.

Conrad Bolton asked how long the signs in question have been up. Mr. Dolan stated 2-3 months. They were ordered back in January so went up at the beginning of February. Mr. Bolton asked if he has seen any effect from the signs and if there were any sales that could be attributed to people finding out about real estate properties from the signs. Mr. Dolan stated yes, he has. He had an individual that was at Tuckers, saw their signs/product displays and will be listing their house for sale in New London with them. Mr. Bolton stated there are also two other signs on that site and he asked when those were installed. Mr. Dolan responded yes they have two other signs. Mr. Bolton asked if Mr. Dolan consulted the ordinances about signs and if he was aware of the guidelines and felt these signs complied. Mr. Dolan stated he consulting with the owner of the building about the signs and the owner had given Mr. Dolan the dimensions that the signs had to fit to follow the existing ordinances. Mr. Bolton asked if Mr. Dolan was aware of any similar signage facing the outside, specifically targeting an outside audience, in any other real estate offices or businesses in town. Mr. Dolan stated aside from the lit menu board, Dunkin Donuts also has product displays in their breezeway that are facing outward. Bill Green's office has a largely lit window box that has similar listings displayed. These are not internally lit but there is a light on them. A local window shade company has an LCD screen that has a video that describes the products they sell. The Verizon store has a large LCD screen in the window. Mr. Dolan shared he looked around town to see what was acceptable. Mr. Bolton asked if this was instead of looking at the ordinances. Mr. Dolan responded that when he looked at the ordinance, it did not say anything about interior signs. Mr. Bolton commented that the ordinance says "interior signs that do not have the name or logo of the business" and his signs have that. Mr. Dolan stated he doesn't consider these to be signs but instead he considers them product displays.

Steve Root stated while they have said these are not monitors, are they not internally lit in some way? Mr. Hildreth responded that the frames have lights. Mr. Hildreth stated they are not conceding that they are signs and they are externally lit since it's the frames that are lit. If the sign is considered to be the page that has the information on it, which is not internally lit. The light source is beside the paper.

Mr. Root stated he has an issue with their use of the word discriminatory in the context that suggests that Mr. Ricker's decision was driven by a desire to do particular harm to Mr. Dolan. He wants to be clear that he objects to that concept if that is what they are saying. He asked what was meant by discriminatory. Mr. Hildreth stated discriminatory means it gets enforced against some and not others. Here is a case where many other businesses have what they view to be functionally equivalent displays in their interior premises and they have had no enforcement action taken against them and the Dolan's have. Mr. Hildreth apologized to Adam Ricker and to the Realtors for suggesting that the information came from a competing realtor as that was wrong information. However, they were clearly encouraging Mr. Ricker to take action and some of them said some unkind things about the Dolan's and that was unnecessary. Mr. Hildreth stated if this doesn't go their way tonight, they will expand their search and he is confident he will find "tons of examples" of what can constitute a sign under our ordinance. Mr. Root stated the distinction that Mr. Ricker made in this case seems to be an obvious and reasonable interpretation that the sign was intended to only refer to things that were aimed to viewers outside the building.

Mr. Hildreth stated this is the piece that doesn't exist in the ordinance. He doesn't disagree that it's not unreasonable for Mr. Ricker to say that, but if you are a business owner and have looked around town and are trying figure it out, it isn't clear and many businesses have violating elements. Chair Todd reiterated that none of those other examples that have been given have been before the board. Mr. Hildreth stated he isn't saying that because they exist that the town has approved them, he is saying the fact that they are there is evidence that this provision of the ordinance on attempting to regulate displays inside a building is unconstitutionally vague.

Pam Perkins, a Broker at Four Seasons Sotheby's shared that when she drives down Main Street on a dark evening she can see their signs lighting up the night sky starting from the Fire Station. She doesn't believe that it matters that it is just 84 feet from the edge of the road as it is an extremely bright blue light and lights up the whole sky. She also shared that Four Season's Sotheby's applied to the town for a similar installation four or five years ago and were told it is against the ordinance. Chair Todd asked Ms. Perkins to describe what she feels is the effect of that sign on the character of the community. Ms. Perkins responded that as a New London native and now seeing what it is like to have a blue light that lights up the night sky, she hopes we decide as a community that this is not what we want our town to look at night.

Marilyn Kidder stated her office is across the street from the Dolan's. She was on the sign ordinance committee many years ago and knew it was just a start and not completely perfect but the intention of it was to keep the signs from becoming so intrusive in our community and give some parameters. It provided a process that involved going in before signs were put up and getting an application and getting it approved. She agrees there are other businesses that need to be spoken to so they understand what they can and can't do. The signs that the Dolan's have are very bright and not the gentle lantern light that we think of on Main Street. She stated it's not about the competition but it feels out of place and so unlike what they want Main Street to look like. Mr. Hildreth asked if the signs had been objectionable in the past month or so and Ms. Kidder responded there have been different times when they are on and when they are not. Ms. Kidder suggested just turning the lights off and leaving the pictures. Why is the bright white light needed? Mr. Hildreth stated it's not the lights from these signs that she's complaining about, it's other light in the office because these frames have not been lit for the past month.

Steve Root stated he doesn't question this is advertising houses for sale and advertising is a service, but these have the name and logo of the agency on them. Would they consider taking that off? Mr. Hildreth responded yes. Mr. Hildreth stated Mr. Ricker sent a second letter that stated he agrees that the monitors are interior window signs that don't appear to be temporary but he doesn't address the lighting. The Dolan's are prepared to forgo the lighting. Mr. Hildreth argued the listings are temporary as they are changing often as property listings come and go. Mr. Root responded that they are asking the board to overturn the decision when under this provision, those signs needed a permit. Mr. Hildreth responded the logo is printed every time a new one is generated and is just a letter D. These are created by Mr. Dolan, are not permanently on the frame and can be removed.

Mr. Hildreth stated municipal boards and officials have a duty to assist property owners to comply with the ordinances to the fullest extent possible. The Supreme Court has said many times that if you can achieve justice by conditioning a decision or modify a decision that is appealed, this is a permissible result.

Lauren Snow Chadwick stated regardless, they will still be dealing with the definition of temporary. They can come up with a number of conditions but will continue to argue whether something that is affixed to a window is temporary and it will be difficult to reach that.

Chair Todd stated the images in the windows, with the intention that they be read by outsiders, is for the purposes of conveying information about the property that is offered for sale. Mr. Dolan agreed that he doesn't own these properties or produce them but has a license to sell them. Chair Todd shared the definition of a product which is "that which is produced commercially for sale". By his own admission, Mr. Dolan stated he doesn't produce these properties, he is merely listing them and they are owned by others. Mr. Hildreth commented that this doesn't fundamentally affect the definition of a sign in our ordinance which includes providing a service. Mr. Dolan provides a service by listing and selling properties.

IT WAS MOVED (Frank Anzalone) AND SECONDED (Heidi Lauridsen) to discuss. THE MOTION WAS APPROVED UNANIMOUSLY.

Frank Anzalone stated it is clear this is an interior window sign and the problem is that it has the name or logo and is internally lit. There is no definition of temporary and these signs are swapped out and the content changes which is not permanent. Chair Todd argued the face of the structure changes but there will always be panels hanging in the window.

Lauren Snow Chadwick stated she is not seeing the vagueness in the ordinance when looking at the path that we get when arriving at a sign that is illuminated in a window. As far as it being temporary, the sign may change but it is always affixed to the window. It isn't temporary and won't ever be removed or taken down. When looking at signs that require a permit, a reasonable person can see when driving down the road these are lit internally. We can get into the science and mechanics of it to try to confuse the issue but this is the type of sign that the nature of the ordinance is trying to avoid. She also doesn't find evidence of discriminatory nature in the sense of trying to point out other signs that might meet the definition that have not come before the board. The Zoning Administrator will be looking into these other examples to make a determination and Ms. Chadwick feels confident that this isn't an issue of just one sign that we don't want in this town.

Mr. Anzalone stated if they were to take the name/logo off and remove the lighting it would be a sign not needing a permit. So as it is now, Mr. Ricker was correct. Ann Bedard stated in most recent and past town meetings, the town is trying to keep a very historic, low key, under lit atmosphere. She recently drove down Main Street and many of the signs are not lit so she takes offense to the words "many, bunches, tons" as there aren't many businesses on Main Street that are lit and doesn't buy into that this was intentionally discriminatory. Mr. Anzalone stated since the Planning Board wrote it, they should address our zoning. Katharine Fischer stated the interior window signs are in violation due to having the name/logo on it. She disagrees with the petitioner stating this isn't a sign and her interpretation of the sign definition is that it is.

Steve Root agrees with Ms. Chadwick noting that the existence of the provision of interior window signs shows that the ordinance is not vague on whether it applies to interior window signs. It does. The argument that there are signs deeper in the interior of a building that can be seen through a window and somehow that renders the ordinance vague as applied is a stretch. No ordinance is perfect and any creative person can find some application that is absurd and claim it is vague. This ordinance is not vague and he agrees signs are internally lit. He supports the decision of the administrator. Peter Theroux also agrees with Lauren Snow Chadwick and also supports Adam Ricker's decision. Heidi Lauridsen addressed that Pam Perkin's request for signs was previously denied and felt that was a relevant fact. She

agrees and feels the lighting is the main issue. Chair Todd responded they can look in the file for the application that Pam Perkins submitted to see what the ultimate result of that was.

After discussion, the board made the following motion:

IT WAS MOVED (Frank Anzalone) AND SECONDED (Heidi Lauridsen) to affirm the decision of the Zoning Administrator. The Board finds the relevant Town Ordinance is not vague as written, or as applied pursuant to Article II, Section 10. Sign Regulations, b. Sign Definition, that it is a sign, Article II Section 10. Sign Regulations, e. Signs Not Requiring a Permit, iv., as the sign contains the name and logo of the business, and Article II, Section 10 Sign Regulations, f. Prohibited Signs, vii., as the sign is internally lit. We have not found any evidence before us that there was any discrimination by the Zoning Administrator.

THE MOTION WAS APPROVED UNANIMOUSLY.

3. Motion to Adjourn

IT WAS MOVED (Michael Todd) AND SECONDED (Lauren Snow Chadwick) to adjourn. THE MOTION WAS APPROVED UNANIMOUSLY.

The meeting was adjourned at 8:09PM

Respectfully submitted,

Trina Dawson

Recording Secretary
Town of New London